Supreme Court No. _____

Court of Appeals No. 240790

Lower Court Case No. 00-724-CZ

STATE OF MICHIGAN

IN THE SUPREME COURT

BLACKHAWK DEVELOPMENT CORPORATION, ~~A Michigan corporation~~, DEXTER CROSSING, LLC, ~~A Michigan limited liability company~~

Plaintiff/Appellant

vs.

VILLAGE OF DEXTER and DEXTER DEVELOPMENT,

Defendants/Appellee

APPLICATION FOR LEAVE TO APPEAL

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I. Statement of Judgment or Order Appealed From and Relief Sought

Plaintiffs/Appellants/Petitioner Blackhawk Development Corporation and Dexter Crossing, LLC (collectively "Plaintiffs" or "Blackhawk") are related companies, whose principal is Joseph Bonar. Plaintiffs sued Defendants Village of Dexter and Dexter Development in the Washtenaw County Circuit Court. On March 25, 2002, the circuit court entered an Order Granting Summary Disposition against Plaintiffs for the reasons articulated on the record at a hearing on March 13, 2002. The Order is attached as Exhibit B, and the transcript of the hearing is separately filed in the accompanying Appendix.

Plaintiffs appeal from a divided, unpublished Court of Appeals decision rendered in this case on January 27, 2004 attached as Exhibit A. Plaintiffs filed a timely Motion for Reconsideration, which was denied in a divided Order dated March 15, 2004. Exhibit A-1.

Plaintiffs request that this Court accept leave to appeal in this case or, alternatively, reverse the Court of Appeals' decision, enter judgment on the scope of the easement in favor of Plaintiffs and remand to allow Plaintiffs to pursue their claims for injunction and damages.

II. Statement of Questions Presented for Review

Whether the Court of Appeals majority clearly erred in failing to construe the easement in accordance with its plain and unambiguous terms, and whether the majority decision conflicts with other controlling law of both the court of appeals and the Michigan Supreme Court.

III. Grounds for Appeal

This application is grounded on MCR 7.302(B)(2), (3) and (5).

This case involves a subdivision of the State, Defendant Village of Dexter, and a an issue of significant public interest, whether the Village conduct was ultra virus in assisting one private developer at the expense of another private property owner.. MCR 7.302(B)(2).

This case also involves legal principles of major significance to the state's jurisprudence as to whether the court of appeals majority ignored Michigan's well established easement law as articulated in *Little v Kin,* 468 Mich 699; 664 NW2d 749 (2003) and other controlling decisions, and whether the majority failed to apply controlling law pursuant to MCR 7.215(J)(1). MCR 7.302(B)(3).

Finally, the majority opinion of the court of appeals is clearly erroneous and it conflicts with the controlling decisions in *Little v Kin*, *supra*, and related cases, *Tolksdorf v Griffith,* 464 Mich 1; 626 NW2d 163 (2001), and *Novi v Adell Trust,* 253 Mich App 330; 659 NW2d 615 (2003)(leave held in abeyance, 671 NW2d 876). The majority opinion also causes material injustice to Plaintiffs by requiring Plaintiffs to allow use of their private property to benefit a neighboring private property owner without Plaintiffs' consent, a condition aptly described by Justice Cooley many years ago an "invasion of liberty and of right…." See *Ryerson v Brown*, 35 Mich 333, 342 (1877).

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IV. Statement of Facts and Proceedings

A. Introduction

This dispute involves an express easement granted on June 4, 1990 in settlement of a condemnation action brought by the Village of Dexter. The easement, in its entirety, states:

> IN CONSIDERATION of the sum of $15,500.00 receipt whereof is hereby acknowledged, the undersigned, JOHN V. KINGSLEY, JR., as Successor Trustee of the John V. Kingsley, Sr. and Mildred I. Kingsley Trust, whose address is 3805 W. Loch Alpine, Ann Arbor, Michigan does hereby grant and convey unto the VILLAGE OF DEXTER, a Michigan municipal corporation, whose address is 8140 Main Street, Dexter, Michigan, an easement for the purpose of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter, Washtenaw County, Michigan, which easement is further described on Exhibit B attached hereto and incorporated herein by reference.

Exhibit C, June 4, 1990 Easement.

Plaintiffs-Appellants Blackhawk Development Corporation and Dexter Crossing, LLC (collectively "Blackhawk") are related companies, whose principal is Joseph Bonar. Mr. Bonar, through his companies, currently owns the property encumbered by the easement and subject to this lawsuit. Defendant-Appellee, Village of Dexter, is a municipal corporation located in Washtenaw County. Defendant Dexter Development is a development company whose principal is John Kingsley. At the time that the above easement was created, John Kingsley, as Trustee for the Kingsley Trust, controlled the property subject to the easement. However, he sold that property along with other adjacent property to Mr. Bonar subsequent to the grant of easement. Sometime after selling the subject property to Mr. Bonar, Mr. Kingsley, through Dexter Development, acquired the property adjacent to and north of the subject property encumbered by the easement. The subject property, encumbered by the easement, separates Dexter Development's property from Dan Hoey Road. Dexter Development's property, however, fronts on and has access to Dexter-Ann Arbor Road.

The lower courts have ruled that the above easement conveys the right to build access drives, landscaping and utilities across the Blackhawk property from Dan Hoey Road to the Dexter Development private property.

B. The Creation of the Easement

On February 12, 1990, the Village of Dexter passed a resolution for condemnation of property then owned by the Kingsley Trust, whose Trustee was John Kingsley, the principal of Defendant Dexter Development. Exhibit D, Village of Dexter Resolution with regard to Condemnation. The Resolution called for the reconstruction of the "badly-deteriorated and unsafe easterly half of Dan Hoey Road" and the realignment of the road with Dexter-Ann-Arbor Road. *Id.* The Resolution stated that the subject property was "necessary" for this purpose and authorized the Village to use its condemnation power to acquire the property. The Resolution also called for the taking of a "fee simple estate" to the property necessary for the improvements. *Id.*

The Kingsleys challenged the condemnation and ultimately settled with the Village. Instead of obtaining a fee simple estate in the entire property, the Village agreed to accept an express easement. In the settlement agreement, the parties agreed that:

> Kingsley shall transfer to Dexter in satisfactory written form an easement for public roadway purposes over the premises described in [the attached legal description].

Exhibit E, 6/27/90 Stipulation in Settlement at 2, ¶ 1.[1]

Kingsley transferred the requested easement to the Village. See Exhibit C, 6/14/90 Easement. The easement grants the Village, in relevant part:

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[1] The 1990 Stipulation in Settlement was incorporated into Blackhawk's June 10, 1996 Development Agreement. See Exhibit F, Blackhawk Development Agreement dated 6/10/96 at p. 1 (fourth paragraph), and Exhibit 10 thereto.

> an easement for the purpose of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter…

Id.

As a result of the settlement, Dan Hoey Road was realigned to the south in order to meet Dexter-Ann-Arbor Road in a perpendicular fashion, rather than at an angle. See Exhibit G, Realignment Drawing. The realignment created a 1.1-acre crescent shaped parcel of property north of Dan Hoey Road which the Kingsley Trust, and ultimately Blackhawk Development, owned in fee, subject to the express easement.[2]

There were four residential homes that had direct access to Dan Hoey Road prior to the realignment. Three of the homes also had direct access to Dexter-Ann-Arbor Road. Only the most westerly parcel had sole access to Dan Hoey Road. Kingsley dep at 31.[3] After the realignment, these homes no longer abutted Dan Hoey Road. The gravel driveways were extended across the crescent shaped property at the time of the realignment. See Exhibit H, aerial photograph of the subject area.

Spaulding Clark, the attorney for the Village in the condemnation action, testified that the four purposes expressed in the easement (relocating, establishing, opening and improving Dan Hoey Road) were accomplished when the Dan Hoey Road realignment construction was completed. Clark dep at 35. He also testified that the Village did not contemplate any commercial development on the land now owned by Kingsley at the time of the condemnation. Clark dep at 16-17. Mr. Clark testified that nothing in the express words of the easement required the property owner, then Mr. Kingsley, to maintain access to the adjoining residential

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[2] The subject parcel has been referred to throughout the case as the "crescent shaped", "Blackhawk", "Bonar" and/or "section 8" parcel or property. The Blackhawk property is contained within Section 8 of Scio Township, and the Kingsley property is contained in Section 5 of Scio Township.

[3] All of the depositions transcripts referenced in this brief are contained in a separate Appendix filed with this brief.

parcels (*Id.* at 30), nor were there any discussions regarding that issue or the future placement of utilities on the parcel. He indicated he believed that there may have been an implicit requirement, as a matter of law, to extend and maintain the existing gravel driveways over the easement property. *Id.* at 30, 34, 42-43.

C. The Dexter Development (Or Dexter Commerce) Project

In the mid-1990's, Kingsley sold the property involved in the condemnation to Blackhawk, which included all the Section 8 land previously owned by the Kingsleys, both north and south of the realigned Dan Hoey Road. The 1.1-acre crescent shaped parcel, now owned by Blackhawk, is subject to the easement described above. See Complaint and Dexter Commerce's Answer to Complaint paragraphs 8, 9; see also Complaint and Village of Dexter's Answer to Complaint, paragraphs 8 and 9. In the mid to late 1990's, Mr. Kingsley began assembling the residential properties in Section 5, north of the realigned Dan Hoey Road and south of Dexter-Ann-Arbor Road. In late 1998 and early 1999, he prepared proposals for a development called Dexter Commerce under the Village's Planned Unit Development Ordinance (PUD). His plans called for the development of a bank, gas station and commercial center on the property he assembled in Section 5. However, his plans also called for the construction of improvements, including access drives to Dan Hoey Road, on the Section 8 property owned by Blackhawk. Janet Keller dep at 15 (Village of Dexter Zoning Officer).

1. The Village's Requirement that Kingsley Purchase the Subject Property

In March of 1990, the Village learned that Kingsley did not own the section 8 property he included in his plans. Keller dep at 30. Since Kingsley did not own the property in Section 8, the Village required him to purchase the property as a condition of approval for his project.

Keller dep at 36, 39, Kingsley dep at 51-52, 179. Kingsley offered Blackhawk $10,000 for the parcel, based on his understanding of residential land values. Kingsley did not undertake to determine the actual fair market value of the property. Kingsley dep at 189-190. Kingsley was unsuccessful in his attempt to purchase the 1.1-acre Blackhawk parcel. (See Complaint and Dexter Commerce's Answer to Complaint, paragraphs 11 and 13.)

After Kingsley's unsuccessful attempts to purchase the Blackhawk parcel, Mr. Kingsley's lawyer, Peter Flintoff, came up with the idea of removing all purported "private" improvements from the Section 8 property, and dedicating the proposed center access driveway to the Village as a "public" improvement. Kingsley dep at 197-199, 206; Exhibit I, 4/20/99 Flintoff correspondence. Kingsley redesigned his project by removing some improvements, most notably a detention basin, from the Blackhawk property. See Exhibits J-1 to J-3, plans showing before and after designs.

2. The Village Rescinds the Requirement to Purchase the Subject Property

Following Mr. Kingsley's redesign of his project, the Village rescinded its condition that Mr. Kingsley buy a portion of the Blackhawk parcel, subject to the proposed redesign. Keller dep at 30-31. The Village of Dexter "authorized" Dexter Development to construct utility and driveway improvements on the Blackhawk property purportedly pursuant to the easement for public roadway purposes identified above. (See Complaint and Dexter Commerce's Answer at paragraph 19 and 22; and Defendant Dexter Commerce's Affirmative Defense No. 1. See also Complaint and Village of Dexter's Answer at paragraphs 14 and 19.)

Dexter Development entered into a Development Agreement with the Village wherein the Village granted Dexter Development a license for the purpose of providing "access to the project" from Dan Hoey Road. Keller dep at 86. See Exhibit K, Dexter Development

Agreement at 3-4. The Agreement recognizes another owner's interest (Blackhawk) in the Section 8 property. Both the Village and Kingsley anticipated this lawsuit, and Kingsley agreed to indemnify the Village. Kingsley dep at 215-216, 221, 224; See Keller dep at 87.

In recommending that the Village approve the redesign of Mr. Kingsley's project, Keller wrote:

> Blackhawk Development still maintains control of the property south of the section line and north of the Dan Hoey Road pavement. Mr. Kingsley has approached Mr. Bonar about buying the property; however, they have not been able to come to an agreement. Therefore, only public improvements are proposed for this area south of the section line. The only improvements that will be made in this area will be landscaping, sidewalks and the access road from Dan Hoey Road to Dexter-Ann Arbor Road. The portion of this road that is south of the section line will be dedicated as a public right-of-way. If the Village were not willing to take this action, the property could be considered landlocked as a result of the Dan Hoey Road realignment, and the Village would be in jeopardy for not providing access to the property.

Exhibit L, 9/28/99 Keller Memorandum.[4]

Janet Keller acknowledged that the proposed Kingsley access drives were not in furtherance of any public improvement of Dan Hoey Road. Keller dep at 83. She testified that the Village had no plans for any improvements in the area. *Id.* at 51-52, 80. See also Kingsley dep at 237. Keller acknowledged that the driveways are solely for access to the commercial development, and serve no other purpose. Keller dep at 51-52, 83, 86.

D. The Improvements in the Easement Area

Kingsley has constructed, or will construct, the following improvements on the Blackhawk parcel: two access roads to Dan Hoey Road (a westerly access and a center access), light poles, trees and landscaping, sidewalks, pipes, conduit, sewer and water. Kingsley dep at

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[4] The actual improvements constructed, or to be constructed, on the Blackhawk parcel are more extensive. See *infra,* §D at 6-7. Mr. Kingsley testified that his property is not landlocked since it has alternate access to Dexter-Ann-Arbor Road to the north. Kingsley dep at 224-225.

116-117.[5] The westerly access road is in the area of the former Stanfil residential driveway, but has been shifted, is wider and takes up more land area of the Blackhawk parcel than the former driveway. Kingsley dep at 118, 154-55, 173-174, 220. There was no existing residential drive in the area where the center access road is built. Kingsley dep at 141. After the required dedication, 72 feet of the center drive will become a "public" road. Kingsley dep at 234-35. Under the approval granted to Kingsley, the remainder of the center access road, all in section 5, would remain a private road. Keller dep at 80.

The Village planner, in a written memorandum, indicated that the road did not meet public road standards. Exhibit M, 11/18/99 McKenna Memorandum p. 2, ¶5. Further, the entrances were designed to commercial entry standards. Keller dep at 76; Kingsley dep at 164.

Mr. Kingsley testified that he could build a commercial development on his property with no access at all to Dan Hoey Road. Kingsley dep at 52, 57-58, 208. His property is not landlocked; it has access to Dexter-Ann-Arbor Road. Kingsley dep at 224-225. There was no engineering impediment to hooking up to the utilities running along Dexter-Ann Arbor Road. Kingsley dep at 60. Mr. Kingsley never submitted plans to the Village showing a development without Dan Hoey Road access. Kingsley dep at 54, 56-57, 90, 92. In fact, in every submission of plans, he shows two Dan Hoey Road accesses: the center access road and another access road at western edge of his property (the westerly access road), both of which traverse over the Section 8 property owned by Blackhawk. Mr. Kingsley testified that he believed he had a right to build the westerly access road over the Blackhawk property because a residential driveway previously existed in that area, even though his westerly access drive covers a larger area than

[5] Kingsley also acknowledged that, despite moving the detention pond, the plans show that grading for the bank of the pond will occur on the Blackhawk parcel. Kingsley dep at 162. According to Janet Keller, the grading is a "private" improvement which should not occur on the Blackhawk parcel. Keller dep at 32.

the former residential drive. Kingsley dep at 156. However, he says he is only building the center access road because he believed the Village wanted it. Kingsley dep at 57-58, 231. He stated that he does not want to build the road, but never shared that sentiment with the Village. Kingsley dep at 232-233.

Janet Keller, from the Village, testified that the Village simply wanted Kingsley to align the center access road he had on his proposed plans with Lexington Road, but did not, to her knowledge or Village records, require that Kingsley build it in the first instance. Keller dep at 65-66. Keller was unaware of any ordinance requirements for the Dan Hoey access, and the Village could not require the access without ordinance support. In fact, Ms. Keller knew of no reason why the Kingsley property could not be developed with access only to Dexter-Ann Arbor Road and without access to Dan Hoey. Keller dep at 72-73. See also Kingsley dep at 121. Kingsley's plans simply all along assumed access to Dan Hoey Road. Keller dep at 75. Likewise, there were no engineering requirements for the Dan Hoey access. Westover dep at 13 (Village Engineer). As of the time of the Kingsley proposal, his entire tract had access to Dexter-Ann-Arbor Road. Kingsley dep at 224-225.

The Village's authorization and Dexter Commerce's construction work on the subject property were performed over the objections of Joseph Bonar. See Complaint and Village of Dexter's Answer at paragraphs 15 and 16. Both Dexter Development and the Village were aware of Mr. Bonar's objections. Keller dep at 55; Kingsley dep at 184.

Neither the Village nor Kingsley informed Bonar of their agreement. Instead, he learned of it only when he observed construction activity on his property. This action was filed as a result of that activity.[6]

E. Prior Proceedings in the Trial Court and Court of Appeals

After discovery on issues of liability only, Defendant Dexter Development filed a Motion for Summary Disposition. In support of its Motion, Defendant argued that the access drives promote public safety and welfare, that the access replace preexisting accesses, that the utility work was within the easement areas permitted pursuant to the decision in *Eyde Bros Dev Co v Eaton County Drain Comm'r*, 427 Mich 271 (1986), and that the construction activity serves a public, not a private purpose. See Defendant Dexter Development's Brief dated 9/28/01. Defendant Village of Dexter concurred in the Motion, and further argued that the Stipulation in Settlement which was incorporated into Blackhawk's Development Agreement, gave further support to Defendants' position. See Defendant Village of Dexter's Brief dated 12/12/01. Plaintiffs responded by arguing that the easement was unambiguous and cannot be read to grant authority for Defendants' commercial, private construction activity, that Defendants cannot assert a prescriptive easement or an easement by necessity, that the *Eyde* decision does not apply to the case, and that the construction activity is illegal both as a matter of constitutional law and constitutes a trespass. See Plaintiff's Brief dated 3/6/02.

The trial court rendered its Opinion from the bench following a hearing on March 13, 2002. The trial court ruled that the terms of the easement were ambiguous and did not preclude

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[6] In Count I of the Complaint, Plaintiff's seek a declaratory judgment that Defendant's actions go beyond any easement rights they may have, and seeking a permanent injunction against Defendants for violating the easement. In Count II of the Complaint, Plaintiff's seek a permanent injunction against Defendants for their unlawful and unauthorized conduct, including trespass upon the property. In Count III of the Complaint, Plaintiff's seek damages for trespass, including treble damages for the willful want and trespass on the subject property.

Kingsley from building his improvements on the Blackhawk parcel. March 13, 2002 Motion hearing Tr at 35-36 (contained in Appendix). The Court entered an Order granting summary disposition for the reasons stated on the record which was signed on March 25, 2002 and entered on March 27, 2002.

In a divided, unpublished opinion, the Court of Appeals affirmed the trial court on other grounds. Exhibit A, Slip Op. Contrary to the trial court, the majority found that the easement was not ambiguous. However, the court ruled that the Kingsley improvements were otherwise lawful. *Id.* The dissent agreed that the easement was unambiguous. However, the dissent argued that the Kingsley improvements go beyond the scope of the express written contract. *Id.*

Plaintiffs filed a Motion for Reconsideration on February 17, 2004, arguing that the Court of Appeals palpably erred in its decision specifically in presuming the existence of a public purpose contrary to the record, failing to follow MCR 7.215(J)(1) by not applying controlling case law, and by looking to extrinsic evidence despite finding the easement unambiguous. In another divided order on January 27, 2004, the court denied the relief with a dissent that would have granted the relief.

V. Standard of Review

This matter becomes before the court following the trial court's grant of summary disposition. The grant or denial of summary disposition is reviewed de novo. The *Harold Co v Bay City*, 463 Mich 111, 117 (2000*); Smith v Globe Life Ins Co*, 460 Mich 446, 454 (1999):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence following the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter

> of law. MCR 2.116(C)(10), (G)(4). (quoting *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363 (1996)).

Smith, 460 Mich at 454-55.

A trial court may not assess credibility or determine facts when deciding a motion for summary disposition. *Skinner v Square D Co,* 445 Mich 153, 161 (1994). Further, "[t]he granting of a motion for summary disposition is especially suspect where motive and intent are at issue over the witness or deponent's credibility is crucial." *Vanguard Ins Co v Bolt,* 204 Mich App 271, 276 (1994); see also, *Rosenberg v Rosenberg Bros Special Account,* 134 Mich App 342, 353 (1984).

In this case, Defendants filed their Motion for Summary Disposition pursuant to MCR 2.116(C)(10). See November 28, 2001 Motion. Plaintiffs argued in response that summary disposition was appropriate with respect to the interpretation of the easement in this case, citing MCR 2.116(I)(2) (court may grant summary disposition to the opposite party where appropriate). Plaintiffs argued that the easement was unambiguous and did not allow for Defendant's private, commercial construction activity. See Plaintiffs Brief in Response to Defendant's Motion for Summary Disposition dated March 6, 2002, at 12, and 8-12. Plaintiffs further argued that if the court found an ambiguity in the easement, that an issue of fact existed as to the facts and circumstances surrounding the easement and as to whether Defendant's current use of the easement was a material increase in burden. *Id.* at 12.

VI. Argument

The Court of Appeals Majority Clearly Erred in Failing to Construe the Easement in Accordance with its Plain and Unambiguous Terms, and its Decision Conflicts With Other Controlling Law of Both the Court of Appeals and the Michigan Supreme Court

A. The Court of Appeals Clearly Erred in Looking Beyond the Four Corners of the Easement to Extrinsic Evidence After Finding That the Easement Language Was Plain and Unambiguous

The easement in this case is expressly restricted to "an easement for the purposes of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter..." Both the trial court and the court of appeals appear to focus primarily on the term "improving" as a basis of their decisions. The trial court apparently found that the term "improving" as used in the easement was ambiguous: "In addition, the terms, 'roadway purposes' and 'improvement' are not specific terms and thus, are not unambiguous." March 13, 2002 Motion hearing Tr at 35-36.

The court of appeals disagreed with the trial court's conclusion that the term "improvement" as used in the easement was ambiguous, finding instead that the language of the express easement was "plain and unambiguous." Slip Op at 5. The court nevertheless itself improperly looked to extrinsic evidence in determining the scope of the easement language. The court stated as follows:

> After applying the plain and unambiguous language of the express easement, we hold that the access roads, sidewalks, utilities, and other improvements to the land at issue are clearly roadway "improvements" as provided for by the public roadway easement.

Slip Op. at 5. **The terms "roadway improvements" and "public roadway" are not contained within the express easement in this case.** Rather, the easement in this case was expressly limited to "an easement for the purposes of relocating, establishing, opening and

improving Dan Hoey Road in the Village of Dexter. . ." Slip Op. at 2. It appears that the court incorporated the term "public roadway" contained in a separate document, the Stipulation in Settlement between the Village and Kingsley, into the express easement. See Exhibit E; see also Court of Appeals reference to the Stipulation of Settlement at Slip Op. 1-2). Reference to the separate Stipulation in Settlement document in this case was improper and irrelevant.

First, in looking beyond the unambiguous words contained in the easement, the court violated well established rules of construction requiring that the unambiguous easement be construed in accordance with its plain language contained within the four corners of the document itself. "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003).

Both the trial court and the court of appeals erred in overlooking **the subject** of the word "improving" in the easement language: Dan Hoey Road. It is undisputed that the improvements sought by Kingsley further his private development, and have no relation to any legitimate effort in "improving Dan Hoey Road." As the dissent makes clear: **"Standing alone, the access roads and utilities were not needed to improve Dan Hoey Road."** Slip. Op., Dissent at 1-2. The easement language itself does not support the court's decision. Rather, the court erred in reading more into the easement than the words allow.

Second, there is no reason the trial court or the court of appeals needed to interpret the term "roadway purposes" contained in the separate Stipulation in Settlement document. The Stipulation in Settlement ended the condemnation case. The condemnation case was filed, according to the Village's Resolution, for the purpose of improving Dan Hoey Road, and no other purpose. See Exhibit D, 2/12/90 Village Resolution. Moreover, the settlement agreement

merely required Kingsley to transfer "in satisfactory written form" an easement for public roadway purposes. Kingsley provided such an easement. See Exhibit E at 2, ¶1. The easement is at issue in this case, not the Stipulation in Settlement. The Village obviously accepted the easement and it is the terms within that easement that are controlling in this case. Thus, in addition to improperly looking to extrinsic evidence, the Stipulation of Settlement, the lower courts' interpretation of the term "roadway purposes" was unnecessary and irrelevant to the determination of this dispute.

B. The Court Clearly Erred in Failing to Apply Well Established Easement Law

The Court of Appeals erred by not applying controlling easement law. The rights of an easement holder are defined by the easement agreement itself. *Little, supra; Theis v Howland,* 424 Mich 282, 297 (1985)*; Great Lakes Gas v MacDonald,* 193 Mich App 571, 575 (1992). [7] The rights of the easement holder "must be measured and defined by the purpose and character of the easement". *Unverzagt v Miller,* 306 Mich 260, 265 (1943); *Theis,* 424 Mich at 297. The rights of the grantee under the easement are paramount, to the extent of the grant, to those of the owner of the soil. *Harvey v Crane,* 85 Mich 316, 322 (1891). However: "The use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delany v Pond*, 350 Mich 685, 687 (1957). *See also Cheslek v Gillette,* 66 Mich App 710, 715 (1976). The easement cannot be modified unilaterally by either party, *Schadewald v Brule,* 225 Mich App 26, 36 (1997), and the subject property, as the servient estate, is not to be burdened to a

[7] The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. *Rasheed v Chrysler Corp,* 445 Mich 109, 127, n 28; 517 NW 2d 19 (1994). A court must look for the intent of the parties in the words used in the instrument. *UAW-GM Human Resources Center v KSL Recreation Corp.,* 228 Mich App 486, 491; 579 NW2d 411 (1998). A court should not to look to extrinsic evidence to determine the parties' intent when the words used are clear and unambiguous. *Id.* The language contained within the four corners of the instrument determines the intent of the parties. *Hasselbring,* 263 Mich 466, 477-478: 248 NW 869 (1933).

greater extent than was contemplated at the time of the creation of the easement. *Barbaresos v Casaszar,* 325 Mich 1, 8 (1949).

In *Schadewald v Brule,* 225 Mich App 26 (1997), the Court of Appeals ruled that an easement for driving access to one parcel could not be utilized for access to a second parcel, even where the plaintiff's property did not appear to be additionally burdened as a result. In *Schadewald*, the court found that, as a matter of law, the easement for one parcel did not extend to a second parcel:

> The Brules argue that they have not increased the burden on the easement. They point out that they are driving the same cars as before over the easement, but after traversing plaintiffs' property they are turning right instead of left. However, the pertinent question is not whether the burden on plaintiffs' property has substantially increased, but rather whether lot 539 has any right to an easement over plaintiffs' property. See *Barbaresos, supra,* at 7-8, *Soergel, supra*, at 589.
>
> The record is devoid of any evidence that lot 539 has the right to an easement over plaintiffs' property, and in fact the Brules do not even claim that lot 539, standing by itself, is legally entitled to benefit from the easement. The rights of an easement holder are defined by the easement agreement.

225 Mich App at 38. Similarly, the Court in *Soergel v Preston* held that Defendants in that case could not unilaterally extend sewer easement rights to one parcel to a second parcel not subject to the easement: "Nothing in the easement agreement entitles the owners of parcel C to benefit from the easement appurtenant to parcel B." 141 Mich App at 589. In *Cheslek v Gillette,* the court strictly confined the use of an easement to the purpose for which it was granted: the operation of a funeral business. 66 Mich App at 715-716.

Likewise, the construction of two commercial access driveways and utilities to service Defendant Dexter Development's commercial center is clearly not expressly authorized by the easement. There is no dispute that the Village was not contemplating constructing access drives or

utilities across the Blackhawk parcel independent of the Dexter Development project. These improvements relate solely to the desire of Dexter Development to build its private, commercial shopping center. They are not improvements to Dan Hoey Road, but rather improvements to the private development.

Clearly, Mr. Kingsley's commercial development is not an improvement to Dan Hoey Road. In fact, no one has testified or argued that the access drives to Mr. Kingsley's commercial development are an improvement to Dan Hoey Road. The testimony is to the contrary:

> Question: These access roads on Dan Hoey were not proposed initially for the purpose of improving Dan Hoey Road, were they?
>
> Answer: No. [Counsel objections]
>
> Question: The roads were proposed solely to provide access to Mr. Kingsley's commercial development, correct?
>
> Answer: I believe so.

Keller dep at 83.

The easement language simply does not provide for the private, commercial construction activity. Moreover, without question, the proposed improvements equate to a unilateral, material increase in burden on the easement property. Improvements are being placed in areas where the Village had no prior improvements. Thus, as a matter of law, it is clear that Defendants are operating outside of the express grant of easement.[8]

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[8] The court of appeals also clearly erred by not examining whether the Kingsley improvements were unnecessary to effectuate the purpose of the easement and whether the improvements unreasonably burdened the owner of the fee simple estate as required by this Court in *Little, supra*, 468 Mich at 701. On the first issue, without question the Kingsley improvements are not necessary to accomplish the "relocating, establishing, opening and improving Dan Hoey Road", since that was accomplished in 1990 without the Kingsley improvements. Second, the Kingsley improvements clearly unreasonably burden Plaintiffs, since they are being forced to allow others onto their property against their will, a condition Justice Cooley aptly referred to as an "invasion of liberty and of right." See *Ryerson v Brown*, 35 Mich 333 (1877), *infra* at 19-20.

C. The Court Palpably Erred in Presuming that a Public Purpose Existed Supporting the Construction of Utilities, Landscaping, and Access Drives for the Kingsley Project on Private Property

In reaching its decision in this case, the court of appeals wrongly relied on the decisions in *Warren v Grand Haven,* 30 Mich 24 (1874), *Grosse Pointe Shores v Ayres,* 254 Mich App 58, 235 NW 829 (1931), and *Eyde Bros Dev Corp v Eaton County Drain Comm'r*, 427 Mich 271; 398 NW2d 297 (1986). The dissent correctly criticized the majority for relying on these cases. With respect to *Eyde Bros*, the dissent explained:

> The Court [in *Eyde Bros*] did not express any opinion with respect to the scope of an express easement. It also did not address a situation where the proposed improvements ran across or under land that was owned in fee simple by a private party and was not established as, or being used as, a public roadway.

Exhibit A, Dissent, Slip Op at 2.[9] The dissent likewise distinguished *Ayers*:

> The easement in this case was an express easement for specific purposes, not a dedication, and the "improvements" sought by defendants do not merely affect the surface or subsurface of Dan Hoey Road, but also plaintiffs' privately owned property, which was not subject to the easement.

Id.

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[9] *Eyde Bros* involved the interpretation of an easement **implied by law** under the highway by user statute, and its holding is so limited. 427 Mich at 299 ("In summary, we hold that for a public highway dedicated by user: 1) the scope of the pubic easement includes not only the right to surface transportation, but also access to the subsurface for those uses, such as sewers, that are adopted by public agencies for the benefit of the public and are implemented through authorized agents.") *Eyde Bros* does not pertain to an **express easement**. See the unpublished decision of the Michigan Court of Appeals in *Norton v Chippewa County Road Comm'r*, 1998 Westlaw 1988721, Docket No. 205275 (Mich App 1998). (Separately attached behind Exhibits.) *Norton* involved a dispute over the scope of a right-of-way over waterfront property. The road commission argued that the right-of-way "for highway purposes" included the right to allow public parking on the side of the street. The court dismissed the road commission's reliance upon *Eyde Bros* and related cases which did not involve an express grant of easement: "The four cases cited and relied on by this court are inapposite because they did not involve an express grant of an easement or right-of-way as is present here." 1998 Westlaw 1988721 at 3. Instead the Court of Appeals ruled that traditional rules of easement construction controlled.

However, assuming for argument purposes that the cases do apply to this proceeding, the court clearly erred in relying on them because the improvements sought in those cases, unlike this case, undeniably involved improvements furthering "public purposes" or other "benefit of the people."

In *Warren v Grand Haven,* Justice Cooley clearly found that the dedication was limited to uses required for **"other public purposes"** and expressly indicated that one such public use was "construction of sewers, which are usually laid under the public streets . . . " 30 Mich at 27-28 (see quote, Slip Op. at 4). Likewise, the dedication in *Gross Pointe Shores v Ayres,* was limited to "other uses for the benefit of the people." Slip Op. at 4-5.[10] In *Warren v Grand Haven* and *Grosse Point Shores v Ayers,* unlike this case, there was no dispute that the additional use of the dedications involved in these cases furthered a public purpose.

In addition, the decisions in *Warren v Grand Haven* and *Grosse Pointe Shores v Ayres,* do not provide the broad authority that this Court found for the placement of private improvements on private property, as in this case. The *Ayers* decision involved a condition precedent contained in a conveyance and dedication that contradicted the very purpose of the dedication itself. *Ayers* has been limited by the Supreme Court to its facts. *Moceri v City of St.*

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[10] The majority Opinion errs in stating that the *Warren* court was dealing with the scope of "an express agreement." Slip Op. at 4. Rather, the street at issue arose from "acts *in pais* constituting a dedication." 30 Mich at 28. The court likewise erred in stating that *Ayres* involved the scope of "an express easement for a public roadway." Slip Op. at 4. *Ayres* did not involve an actual easement agreement like this case, but rather defendants "conveyed and dedicated lands for the purpose of a highway." 254 Mich at 60. A dedication is distinct from an express easement. "A dedication is merely an appropriation of land to some public use, accepted for such use by or in behalf of the public." *Clark v City of Grand Rapids,* 334 Mich 646, 656-57; 55 NW2d 137 (1952). (Citations omitted) On the other hand: "An easement gives no title to the land on which it is imposed and is not an estate in land, although it is an interest in land." *Theis v Holland,* 424 Mich 282, 467 fn5; 380 NW2d 463 (1986). (Citations omitted) The "use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delany v Pond,* 350 Mich 685, 687; 86 NW2d 816 (1957).

Clair Shores, 366 Mich 380, 384; 115 NW2d 103 (1962). In *Moceri*, the court interpreted the express terms of a dedication made to City of St. Clair Shores in a subdivision plat. The court determined intent based on the language contained in the dedication:

> Had the owners of the property, in preparing the plat thereof and causing it to be recorded, intended the grant of a continuing easement for acceptance at any time in the future when necessity therefore might arise must assume that appropriate language to express such intention would have been used.

366 Mich at 383-84. The court also expressly distinguished the *Ayers* case, which involved a condition subsequent that was inconsistent with the purpose of the grant itself:

> We are not here concerned with an attempt on the part of the grantor of an easement for public purposes of the character here involved to impose an inconsistent condition or reservation on the grant. Rather, the issue before us involves the extent of the grant which we think the language accorded clearly indicates. The decision of *Village of Grosse Pointe Shores v Ayers*, [citation omitted] to which counsel for defendant has called attention, is not pertinent to the question of construction in the case at bar.

366 Mich at 384.

Further, Justice Cooley was not authorizing the use of public dedications to advance the interests of a private developer in *Warren v Grand Haven*. Indeed, Justice Cooley abhorred any suggestion that the government could facilitate benefits to one private property owner to the detriment of another. See *Ryerson v Brown*, 35 Mich 333 (1877). In *Ryerson*, Justice Cooley wrote an opinion striking down a statute that allowed one private property owner to take another owner's land in order to erect a water mill. In striking down the statute, Justice Cooley stated:

> It would under any circumstances be pushing the authority of government to extreme limits; and unless the reasons for it were imperative, would be likely to lead to abuses rather than tend to the promotion of the general interest, and to breed discords where, in the absence of such legislation, moderate counsels and final agreement might have prevailed. If in individual instances obstacles are encountered in the unreasonable objections of individual land owners, the rare instance cannot justify a general law which would be likely to breed as many grievances as it

> would cure, for legislation of this sort has always grievous when no great necessity justifies it; and it is always an invasion of liberty and of right when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his land; but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without the liability to be called to account for his reasons or motives, so long as he is doing only that which he has a right to do.

35 Mich at 342. Accord: "[P]ublic use implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property if the right of the government to seize and appropriate could exist for any other use." *Thomas Cooley, A Treatise on Constitutional Limitations on the Police Power of the States* (1868) at 531.

Likewise, in *Eyde Bros* there was no dispute that the proposed installation of sewers under the street furthered a public purpose. The decision in *Eyde Bros* had at its core the presumption of a public purpose and use. It was presumed that the government had a right to extend the sewers *within the roadway*. Plaintiffs in *Eyde Bros* objected to the lack of compensation and that the improvements were being made by a private developer. The court held only that the government had a right to make sewer improvements within the roadway of a highway dedicated by user. It also noted that the legislature specifically authorized such improvements to be made by private developers. See *Eyde Bros,* 420 Mich at 290-91 (citing MCL 280.433). Importantly, the Village and Kingsley were not operating under such statutory authority in this case. Not only is there not a public use or purpose in this case, there is also no statutory authority for the Village to delegate the construction of these purported "public" improvements to Kingsley.

In the cases relied upon by the court of appeals, the issues only involved whether the government had the authority to make improvements *within* the roadway. None of the parties

disputed that the proposed improvements furthered a public purpose. In this case, it is undisputed that there is no public purpose driving the proposed improvements. Rather, it is solely in furtherance of the private Kingsley development.

D. The Court of Appeals' Decision is Contrary to This Court's Decision in Tolksdorf and the Decision in Adell Trust

As discussed above, the court of appeals never reached the issue whether there was a valid public purpose underlying the proposed improvements in this case. However, a previous panel of the Michigan Court of Appeals has ruled that the government's desire to build a "public road" that only serviced private property did not amount to a public purpose. See *Novi v Adell Trust*, 253 Mich App 330; 659 NW2d 615 (2003).[11]

In *Adell*, the government attempted to build what was essentially a private driveway to two private businesses over the property owned by The Adell Trust. The private industrial user benefiting from the road agreed to pay, at least in part, for the road. The City agreed to accept the road as a public road. Further, it was all done under the purpose to alleviate congestion and promote safety. Notwithstanding, both the trial court and the Court of Appeals, applying this court's decision in *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616 (1981), clearly found that the private interest predominated over any purported public interest:

> Here, the record convinces us that the purpose, or part of the purpose, of the taking was to confer a private use or benefit on Wisne/PICO. The primary beneficiary of the taking is not the public, but rather Wisne/PICO. Although we assume the validity of the public interest advanced by the City, we find that the private interest to be benefited predominates over the asserted public interest. The asserted public interest therefore does not justify the proposed taking of private property by the City. The taking was thus unconstitutional.
>
> * * *

[11] Application for Leave held in abeyance pending resolution of *County of Wayne v Hathcock*. See 671 NW2d 876 (2003).

> Here, the City has not demonstrated the public is primarily be benefited from the construction of A.E. Wisne Drive. Rather, the spur benefits specific and identifiable private interests, those of Wisne/PICO. The trial court correctly applied heightened scrutiny and we agree with its analysis. The public benefit here is not clear and significant; rather it is speculative and marginal. The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction.

Adell, 253 Mich App at 355-56. The Court found that the proposed public road predominately benefited a private interest.[12]

Michigan Court Rule 7.215(J)(1) requires an appellate court panel to follow "the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by special panel of the Court of Appeals as provided in this rule." The *Adell Trust* case clearly fits within the guidelines of this rule. Accordingly, the rule of law established in *Adell Trust*, that one private property owner may not be forced by the government to accept a "public road" servicing a neighboring private property owner, should have been applied in this case. The court clearly erred in failing to follow MCR 7215(J)(1).

Consistent with *Adell Trust* is the persuasive New Jersey appellate decision in *Township of West Orange v 769 Associates,* 341 N.J. Super. 580; 775 A2d 657 (2001) (attached separately behind Exhibits). New Jersey courts have adopted the *Poletown* heightened standard of review for projects benefiting private interests. 775 A2d at 662. In that case, the Township attempted to condemn a public road as an access to a private development. The public road was to be used "for ingress and egress out of the [developer's] property," as well as ingress and egress for an

[12] Accord: *City of Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993); *City of Centerline v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987).

adjacent private property. 775 A2d at 663. Like this case, the development had access to another road, Cedar Avenue:

> Although there was local neighborhood opposition to the use of Cedar Avenue, the position of community members does not control or dictate the Township's exercise of eminent domain power. No sufficient reason appears in the present record to warrant the exercise of eminent domain power to construct the proposed southerly right-of-way instead of utilizing a Cedar Avenue route. Unless it could be proven that access to Cedar Avenue is non-existent or precluded by law, the Nordan development would technically not be landlocked without the proposed right-of-way. Although the record does not establish that Nordan's property is landlocked, the fact that property might be landlocked, and not so created by a public entity, does not warrant the exercise of eminent domain for private development. The power of eminent domain by government or public agencies is an awesome power which may only be properly used for a public purpose.
>
> * * *
>
> Associates argues that he Township improperly bargained away its power of eminent domain to Nordan. The fact that Norton was to reimburse the Township for all costs associated with the condemnation makes it clear that Nordan is using the Township as its alter ego to acquire by condemnation what it could not do through negotiation.
>
> * * *
>
> Hence, applying heightened scrutiny, we conclude that the condemnation proceeding was primarily for a private purpose and was improper.

775 A2d at 664-665. The reasoning of *Adell Trust* and *Township of West Orange* is sound: Government should not utilize its powers to benefit one private property owner at the detriment to another private property owner. [13]

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[13] Defendants argued below at oral argument that Plaintiffs' citation of eminent domain cases is irrelevant to this case. However, as the courts of appeals' acknowledged in its statement of the facts, the easement in this case arose out of an eminent domain proceeding. Exhibit A, Slip Op at 1. Moreover, the scope of the term "public purpose" or "public use" has been frequently articulated through eminent domain cases. Defendants themselves argued that the improvements furthered a public purpose both at the trial court level and in their appellate briefs. Dexter Dev

This reasoning can also be found in another controlling decision overlooked by the court of appeals, the Michigan Supreme Court's decision in *Tolksdorf v Griffith,* 464 Mich 1; 626 NW2d 163 (2001). In *Tolksdorf v Griffith,* 464 Mich 1 (2001) this court addressed the application of the "public use" clause to the Private Roads Act, a statute that allowed landlocked property owners the right to gain road access across their neighbor's property without that neighbor's consent. Plaintiff had acquired a landlocked parcel that he intended to subdivide into lots. The local township supervisor refused to initiate proceedings under the Private Roads Act. The trial court denied plaintiff's request for a writ of mandamus compelling the supervisor to act, but the court of appeals reversed and remanded with instructions to issue the writ.

In a 6-0 decision, the Michigan Supreme Court found that, without question, the Private Roads Act authorized a taking, relying on the Supreme Court decision in *Nollan v California Coastal Cmm'n.,* 483 US 825; 107 S Ct 3141 (1987). The court noted that the Act infringes upon the reluctant neighbor's right to exclude others from his or her property. Further, the court found that the purported public interest advanced by the Act, access to landlocked property, was not predominant:

> We note that the act does not impose a limitation on land use that benefits the community as a whole. Instead, it gives one party an interest in land the party could not otherwise obtain. By eliminating the landowner's right to exclude others from his property, the act conveys an interest in private property from one private owner to another.

464 Mich at 10. The *Tolksdorf* case struck down a statute that allowed a *landlocked* property owner to obtain access over his neighbor's property. The lower courts, without statutory

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LLC's Brief in Support of Summary Disposition dated 9/28/01 at 6-9; Dexter Dev LLC's Brief on Appeal dated 9/27/02 at 20-23. Ironically, this court of appeals' decision would uphold the notion that the Village can obtain more through a public easement granted in settlement of a condemnation proceeding than it could have obtained through condemning the land in fee simple itself (which is what the City of Novi unsuccessfully attempted in *Adell Trust).*

authority, have allowed a private owner of a *non-landlocked* property to obtain access over his neighbor's property, contrary to the holding in *Tolksdorf.*

The decisions in *Tolksdorf* and *Adell Trust* do not allow for the court of appeals presumption of a public purpose underlying the improvements for the benefit of a private developer. Even if the court were correct with respect to its broad interpretation of *Warren*, *Ayers* and *Eyde Bros* respecting the placement of *underground* utilities, the cases do not support the placement of *above-ground* access drives to private developments. The decisions never even mention access roads for neighboring developments.[14] At the very least, the court committed error in sanctioning the access roads, particularly in light of two more compelling (and controlling) decisions where Michigan courts have refused to allow private property owners the right to obtain drive accesses over their neighbors' property under the color of Michigan law. *Tolksdorf supra*; *Novi v Adell Trust supra.*

E. The Testimony Demonstrates a Predominately Private Purpose for the Improvements

In this case, the improvements are not being made to advance a public interest. Rather, all of the improvements are being made solely in conjunction with Mr. Kingsley's private development. Mr. Kingsley is paying for the improvements, and he's indemnified the Village against this very lawsuit that he knew would be coming.

The court of appeals acknowledged the following facts:

- There is no dispute that Dexter Commerce Center is a private development;

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[14] Importantly, the sewers in *Eyde Bros* were placed underneath the existing roadway, and did not cross the plaintiff's property perpendicularly to the roadway as in this case. Blue Cross had its own fee simple access to the roadway in order to hook up to the sewers. See Exhibit N, map from *Eyde Bros*, Supreme Court Appendix.

- Kingsley testified that the PUD could have been developed without the access roads from Dan Hoey Road;

- There was no legal or engineering impediment to Kingsley tapping into the utilities running along Dexter-Ann Arbor Road. **The issue was a political one that the Village wanted to resolve;**

- The [Kingsley development] agreement also provides that Kingsley will indemnify the Village in any action brought by anyone claiming an interest in the disputed property. Kingsley admitted that plaintiffs' suit was anticipated.

Exhibit A, Slip Op. at 3 (emphasis added).[15] Further, it is noted in the Dissent:

- None of the measures taken by Defendants, even if required by the Village, would have been necessary for *any* reason were it not for the development of the Dexter Commerce Center.

Exhibit A, Slip Op Dissent at 1.

The testimony of the Village's primary witness, Zoning Enforcement Officer Janet Keller, makes clear that the Kingsley improvements predominately serve a private interest. Although Janet Keller indicated that good planning principles would support access to Dan Hoey Road, she acknowledged that no studies were performed to determine whether or not the Kingsley development could be done safely without access to Dan Hoey Road, and that her "opinion" was merely a "guess". Keller dep at 84, 100. Keller could think of no reason why the development could not go forward with just Dexter-Ann-Arbor access. Keller dep at 72-73. Kingsley acknowledged that he preferred more access to his property and benefited from the Dan Hoey accesses. Kingsley dep at 226-227, 228-229. Specifically:

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[15] The court of appeals appears to assert, wrongly, that part of the land was already owned by the Village "in fee simple," although the court does not appear to rely on it in its decision. Slip Op at 2, n2. The record does not support this statement. In fact, Defendants admitted below that Plaintiffs owned the property subject to this dispute and that the Kingsley improvements traversed over the subject property. Compare Complaint, ¶¶ 8, 9 and 12 with Dexter Village's and Dexter Development's respective Answers ¶¶ 8, 9 and 12.

> The Dexter-Ann Arbor Road center road access benefits me and very specifically this westerly Dan Hoey Road intersection benefits me. This one is a benefit because it's there, but the project - - [16]
>
> * * *
>
> The easterly entrance to Dan Hoey Road does benefit me because it's there, but the site will work without it.

Kingsley dep at 229.

Kingsley and his project, not the public, are the primary, if not exclusive, beneficiaries of the improvements. Without the project, there is no need for the access and utility improvements. Keller dep at 51-52, 67, 81-84, 86. The Village's Zoning Officer confirmed that there was not a public need for the Dan Hoey driveway accesses:

> Question: Are there any public improvements, to your knowledge, that are on the Kingsley parcel?
>
> Answer: Such as?
>
> Question: As you might - - well, I don't know. That's why I'm asking you. The point is, these driveways all four of them exist solely to provide access to Mr. Kingsley's commercial development, correct?
>
> Answer: Yes.
>
> Question: There is no Village – owned facilities on this property?
>
> Answer: That's correct.

Keller dep at 51-52.

In *Adell*, Novi sought to address **existing** safety concerns. 253 Mich App at 345. ("There was also evidence, to which defendants stipulated, that the current exit from the Wisne/PICO property onto Grand River Avenue created a hazardous situation for the Grand River traffic."). The safety concerns raised by the Village here were **prospective** issues caused by the Kingsley project itself. There was no evidence presented below that any safety issue

[16] Interestingly, Kingsley is under no obligation to dedicate any part of his westerly access road, an inconsistency left unexplained by the Defendants.

existed absent the Kingsley project. Defendants simply offered circular reasoning to attempt to shoehorn issues raised by the private development itself into a justification based on public concerns. Simply put here: no private project, no concerns.

These facts, on their face, demonstrate the absence of any overriding public purpose here. The appeals court majority clearly erred in presuming that the improvements, made solely to further the Kingsley's private project, served a public purpose.

Getting back to the express easement in this case, Defendants cannot explain how Kingsley's improvements for his private project further "the purpose of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter." See Easement, Exhibit A. There is no question that the improvements were not proposed for that purpose. Instead, this Easement was only used as a device by Mr. Kingsley's attorney to avoid the Township's initial requirement that Kingsley purchase the Blackhawk property.

F. Defendants Cannot Assert a Prescriptive Easement or an Easement By Necessity.

Although the trial court did not address the issue, Defendants argued that the former residential driveways that extended across the subject property grandfathered to Defendants the right to the two commercial drive accesses at issue. This argument has no basis in Michigan law. First, Defendants did not raise and preserve a claim for prescriptive easement or easement by necessity. See MCR 2.111(F)(3)(b). Further, there is no dispute that Defendants cannot merit the legal threshold for these claims:

> A claim of prescriptive easement would fail because, at a minimum, plaintiff has failed to use lot 21 for the requisite fifteen-year prescriptive period. See MCL§ 600.5801; MSA§27A.5801. A claim of easement by necessity would fail because there is no true necessity, as plaintiff is not landlocked. See *Goodman v Brenner*, 219 Mich 55, 59, 188 NW 377 (1922). Finally, a claim of implied easement would also fail. A claim of implied easement

> arises where two or more tracts of property are created from a single tract, and the use of the servient estate for the benefit of the dominant estate is apparent, continuous, and necessary. *Rannels v Marx,* 357 Mich 453, 98 NW2d 583 (1959). In this case, the lots were already distinct at the time of the alleged grant, and there is no necessity.

Forge v Smith, 458 Mich 198, 211 n38 (1998).

The residential driveway accesses were extended in 1990, when the subject easement was created This case was filed in 2000. Thus, the 15-year requirement for prescriptive easements cannot be met. Further, the driveway accesses were not created pursuant to a lot split from a single tract, ruling out an easement by necessity. As a result of his assembling the land, all of Kingsley's property has access to Dexter-Ann Arbor Road. Kingsley dep at 224-225. None of the property is landlocked. Thus, no necessity could exist for an easement by necessity. See *Waubun Beach Assn'n v Wilson*, 274 Mich 598, 608, 610, 615 (1936) (Easement by necessity ceases when another way of access has been acquired.)[17]

The existence of the former residential drives is irrelevant to this dispute. Defendants could cite to no law that allows a subsequent land assembler like Kingsley to assume he can use the former residential gravel drives as a basis for two new commercial access roads. Kingsley is not proposing to use the former driveways. Even the westerly access drive is larger and takes up more property.

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[17] The majority opinion makes reference to these preexisting drives in citing to extrinsic evidence underlying Kingsley's testimony regarding the condemnation settlement negotiations. The court errs in suggesting that there were "some" residences that were landlocked, and that there were landlocked "parcels." Only one residence, the most westerly parcel would have been landlocked without the gravel driveway extension. All of the remaining residences had direct access to Dexter-Ann Arbor Road. Kingsley dep at 31. Further, Kingsley acknowledged that the westerly access drive is larger and takes up more land than the former residential drive. Kingsley dep at 156.

Conclusion and Relief Requested

The Village of Dexter's initial position in response to the Kingsley private development proposal was the legally proper one: the Village conditioned approval of the Dan Hoey accesses and improvements in the easement area on Kingsley purchasing the Blackhawk parcel. Yet, based on a course of action devised by Kingsley's attorney to avoid the purchase requirement, and safely shielded by Kingsley's grant of indemnification, the Village changed its position and wrongly attempted to delegate public stature to a private developer's commercial project. The construction activity is not authorized by the express grant of easement and is not authorized by law.

The reasoning of the dissent is both succinct and consistent with Michigan law:

> Improving Dan Hoey Road cannot be read to mean that the Village had the right to authorize the building of access roads, sidewalks, landscaping, lighting or the running of public utilities across land being unused by the Village for the sole purpose of developing the Dexter Commerce Center, *a private development.*
>
> If the use of the easement is confined to the purposes for which it was granted, there is not question that the construction on plaintiff's property was improper. I believe that it is disingenuous for defendants to argue that the construction that has occurred is within the scope of the easement because they are necessary for the same reason Dan Hoey Road needed to be realigned, public safety and welfare. But defendants' fail to recognize a key point. None of the measures taken by defendants, even if required by the Village, would have been necessary for *any* reason were it not for the development of the Dexter Commerce Center. Standing along, the access roads and utilities were not needed to improve Dan Hoey Road.

Exhibit A, Slip Op Dissent at 1-2. (Emphasis in original)

Plaintiffs request that this court grant leave to appeal or, in the alternative, reverse the court of appeals based on the reasoning and conclusions of the dissent, grant summary disposition in favor of Plaintiffs and remand to allow Plaintiffs to pursue their claims for injunction and damages. Exhibit A, Slip Op Dissent at 2.

Respectfully submitted,

BERRY & REYNOLDS PC

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